

MINUTES OF THE LAWYERS ADVISORY COMMITTEE MEETING JANUARY 23, 2008

The Lawyer's Advisory Committee convened at 6:00 p.m. at the restaurant Settimo Cielo.

- 1. LAC Chairperson John Morton called the meeting to order. The Minutes of the LAC meeting of September 11, 2007 were approved.**
- 2. There was a welcome of new members: Mariah Murphy, Esq. and Herbert Raymond, Esq.**
- 3. Committee Reports:**
 - A. Local Rules Committee – Warren Martin:**
 - B. Local Rules: Annual Cycle for Local Rule Amendments 2008 – Warren Martin and Jeanne Naughton**

Local Rules Subcommittee Chairperson Warren Martin reported on the meeting of the Local Rules Subcommittee of the same date. The Subcommittee discussed the six active proposals for local rule amendments for 2008. An agenda for completion of work was established. Warren indicated that the goal of the Subcommittee is to have all LAC generated proposals in final draft form on or before February 28, 2008 so that the proposals may be considered by the LAC as a whole at its March 2008 meeting and subsequently by the Board of Judges at its meeting scheduled for March 2008 meeting.

The “working collection” of the six LAC generated local rule proposals for 2008 were circulated and discussed at the September 2007 LAC meeting. (The full history and inclusive discussion of each of these proposals are outlined in a Memorandum of Jeanne Naughton prepared for the LAC dated 1-22-08.)

Of the six proposals, Warren advised that three proposals have been acted upon by the Board of Judges for final resolution at or before the Board of Judges Meeting scheduled for March 13, 2008 (***DNJ LBR 2016-1(j), Compensation of Professionals; DNJ LBR 4001-1, Automatic Stay - Relief From; and DNJ LBR 1019-1 Conversion - Procedure Following***), and three remain to be vetted or examined more closely at the January 23rd LAC meeting in order to determine overall viability for potential rule amendment (proposed new rule ***DNJ LBR 3001-1, Proof of Claim; DNJ LBR 9013-1, Motion Practice ; and proposed new rule DNJ LBR5008-1 regarding Investment of Bankruptcy Estate Assets***).

1. Proposed Amendment of *D.N.J. LBR 2016-1* at subparagraph (j)(3), concerning allowance of attorney fees in secured creditor's proof of claim

This proposal has been approved in concept at the Board of Judges Meeting 12-13-07 subject to the Board's re-draft for final approval at or before the March Board of Judges meeting. The question posed for the LAC is as follows: What amount (at or above \$200) would strike a fair and reasonable balance as compensation for the post petition, pre-confirmation services of a secured creditor's attorney, for pre-confirmation services (including preparing and filing a proof of claim, reviewing the initial chapter 13 plan, filing an objection to confirmation of that plan and appearing at the confirmation hearing)?

In discussing this proposal, there was an expressed concern that the Court may be treading into matters that are more substance rather than procedural. That is, the proposal would allow by promulgation of a local rule, *prima facie* validity to attorney's fees through the standard inclusion of such fees in a proof of claim. The concern expressed was that such an approach may not be giving full recognition to the many variables that may operate to invalidate such a fee, for example, where a non cure plan involves a claim that may not be oversecured for purposes of section 506(b) of the Code, or with regard to a cure plan, where the fee sought may be beyond the "cap" set by the New Jersey Court Rules in circumstances in which a judgment of foreclosure has been obtained. In sum, there was discussion of the fact that the Court may not necessarily seek to designate a fee as *prima facie* valid, with the prospect that there may be substantive argument that a secured creditor should not be compensated *at all* for the ministerial function of filing a proof of claim, or in light of the other variables.

Language and drafting were also cited as a potential hurdle. There was additional discussion that in inserting every substantive objection into the text of the rule, the language may become unwieldy (e.g. "the fee shall not be contrary to application of non-bankruptcy law New Jersey Court Rule 4:42-9. . ."). The prospect of putting variables into any 2008 Comment to the Local Rule was also discussed.

Judges Stern and Lyons to propose a revised draft.

2. Proposed Amendment of *D.N.J. LBR 4001-1, Automatic Stay - Relief From-*

This LAC proposal seeks allowance of attorney fees and costs for secured creditors in conjunction with motions for relief from the automatic stay and/or certifications of default. The proposal has been approved in concept at the Board of Judges Meeting 12-13-07. *Notice to the Bar* dated December 5, 2007 has been provided indicating that effective immediately, pending any potential modification of D.N.J. LBR 4001-1, the Board of Judges has approved an increase in the allowance of attorney fees and costs for secured creditors. Upon entry of an order pertaining to a motion for relief from the automatic stay or creditor's certification of default, attorney fees in the amount of \$350.00 plus filing costs of \$150.00 (if applicable) are deemed *prima facie* reasonable. Any fee requested in excess of \$350.00 will not be allowed unless specifically approved by way of a fee application in conformance with *D.N.J. LBR 2016-1*.

Given the sense of some members of the Board of Judges that a local rule may not be necessary insofar as the notice to the bar has accomplished the goal, the LAC Subcommittee recommends foregoing a local rule in favor of allowing the *Notice to the Bar* to stand.

3. Proposed Amendment of *D.N.J. LBR 1019, Conversion - Procedure Following*

This LAC proposal seeks a waiver of the fee for conversion from Chapter 13 to Chapter 7 in cases that have been reconverted to Chapter 7 for the reason that Standing Trustees pay the conversion fees out of their operating budgets.

The Subcommittee advises that this proposal is resolved without the need for a local rule. The issue is governed by the *Fee Compendium* at Section D.1.B.6 Conversions to Chapter 7, Exemption for Case Trustee, and D.1D. Conversions back to Chapter 7 (Reconversions).

A technical modification can be made to CM/ECF in accordance with the guidelines, whereby when a Standing Trustee files a motion to convert or reconvert, upon the filing of a *Certification of No Funds in the Estate*, the fee can be waived. A form certification will be drafted for use by Standing Trustees. AO confirmation of this process will also be sought.

4. Proposed New Local Rule - *D.N.J. LBR 3001-1, Proof of Claim*

This proposal seeks a new rule regarding transferred claim or change of address of creditor. The Subcommittee decided not to pursue this proposal as a local rule.

5. Proposed New Local Rule, *D.N.J. LBR 5008-1* regarding Investment of Bankruptcy Estate Assets.

This LAC Proposal seeks a new local rule setting forth a simplified notice and objection procedure to permit deposit of estate cash into U.S. Government-backed money market mutual funds.

After some discussion as to whether or not to pursue this proposal as a local rule given the areas of responsibility traditionally reserved to the Office of the United States Trustee as well as the fact that a similar proposal that was considered nationally, Warren Martin undertook to provide a draft for further consideration.

6. Proposed New Local Rule, *D.N.J. LBR 9013-1(d)*, Motion Practice

This LAC proposal seeks to address the issue of reply papers in connection with motions in bankruptcy court. Glennon Troublefield will provide a draft for consideration of the Board of Judges.

C. Chapter 13 Committee – Jaimie Finberg

- i. Additional plan provisions: Chapter 13 subcommittee to review and determine whether any provisions need to be added to model plan in response to certain plans containing boilerplate language in the format of “Additional Plan Provisions”

The Chapter 13 Subcommittee reported on the issue of whether any or all of the additional plan provisions and/or 524(i) plan provisions warrant inclusion in the District’s Model Chapter 13 Plan. The conclusion reached by the Subcommittee is that none of the provisions, as written, warrant inclusion in the Model Plan as the provisions are boiler plate in nature and too vague. While the Subcommittee would not recommend including any of the provisions as written, it did agree that paragraph 2 to the 524(i) plan provision raised an issue worth exploring with regard to mortgage lenders and escrow statements. To that end, it would recommend including a permissive statement in the model plan that would allow a mortgage lender to send escrow statements without fear of violating the stay. This statement would be similar to Paragraph 7(b) to the Model Plan that allows a secured creditor to continue to send notices or payment coupons without violating the stay. The Subcommittee believes that the model plan “as is” works well and that for those instances where additional provision needs to be added, it must be by way of a separately filed motion.

There was an additional suggestion by Judge Wizmur originating from Isabel Balboa to modify the form Chapter 13 Plan to address domestic support obligations and to develop a standard form of order to address a motion to expunge or modify the claim of a DSO.

D. Attorney Discipline Mentors Subcommittee – Bunce Atkinson

After a detailed discussion by Bunce introducing the concept of a General Welfare Committee (GWC) to whom judges and others might be able to confidentially refer attorneys who may be dealing with issues regarding emotional problems or substance abuse, the LAC as a whole moved to authorize Bunce to contact Diane Vuocolo and the State Bar Association to see whether this concept could be furthered.

The LAC in general as well as the Office of the United States Trustee favored the idea insofar as it was recognized that judges often encounter attorneys with regard to whom they are not comfortable referring to an ethics committee but may have no other course of intervention. Bunce reported on a General Welfare Committee that serves as a panel of 7 individuals in Monmouth County. The Chairperson contacts the individual and offers assistance on a confidential basis.

E. Chapter 11 Subcommittee- Issue raised by Jerold Kulbeck, Esq.- Proposal to draft form of order regarding information that must be provided by creditors committee to creditors. §1102(b)(3).

This issue as well as several other Chapter 11 related issues were briefly discussed by Judge Wizmur with regard to what is currently being done in the Southern District of New York as well as Delaware with regard to for e.g. 363 sales *vis a vis* notice, and extraordinary aspects of sales (insider transactions, breakup fees, guidelines to set up bidding procedures, form of sale order, etc). The matters were referred to a Chapter 11 Subcommittee to be Chaired by Valerie Hamilton. Charlie Forman, Warren Martin, Glennon Troublefield , Chris Gravelle, Martha Hildebrandt and Jeanne Naughton agreed to assist Valerie with regard to Chapter 11 issues on a going forward basis.

4. Clerk's Report – Jim Waldron

Jim Waldron reported that filings for Chapter 13 cases have been “flat” in the District. Chapter 7 filings are significant and steadily increasing. Jim also reported that New Jersey has had the largest number of Chapter 11 cases in the country ending in June and September 2007. That is, it was recognized that New Jersey has had at least 100 more Chapter 11 cases than any other District.

5. Liaison Reports: District Court (no report); U.S. Trustee (Martha Hildebrandt reported that there is a roundtable with Chapter 7 Trustees scheduled for 1/24/08 and that the Audit Program has been suspended); IRS (no report); N.J. Attorney General (no report) ; NJ Bar Bankruptcy Section (Judge Wizmur reported that there will be a reconstituted subcommittee chaired by Geraldine Ponto to address *pro bono* efforts around the state to bring big firms “back to the table” and reinvigorate interest in *pro bono* work. A meeting will be scheduled and all are welcome to attend and participate.)

6. Old Business:

See above Discussion of proposed Local Rules.

- i. In addition to the above Local Rules amendments, there was suggestion posed by Peter Zimmis in a letter proposing five suggestions relating to the perceived issue of mortgage company abuse regarding the misapplication of mortgage payments.

In response to these issues, Judge Lyons indicated that as NCBJ liaison to the Chapter 13 Trustees, he was not optimistic about these suggestions, including: (1) sanctions for misapplication of mortgage payments; (2) lowering trustee commission where debtor makes mortgage payments to the Chapter 13 Trustee; (3) amending language of confirmation order to include a provision that secured creditors must accurately and timely apply all payments towards the secured loans; (4) amendment of local form 16 to include a column for identification of the check # and/or money order #; and (5) addressing potential bankruptcy fraud committed by debtors by defining at exactly what point an attorney becomes a debt relief agency.

Judge Lyons identified the USFN (US Foreclosure Network) and AFN (American Financial Network) as the two organizations that worked with the Chapter 13 Trustees to recommend best practices for mortgage servicing. Current concepts being promoted include applying payments made by debtors in chapter 13 cases in accordance with the plan as well as some solutions for the longstanding problem that mortgage servicers still do not have adequate software to track post petition payments.

Judge Wizmur made the suggestion that a local rule could be proposed to assist debtor's counsel by requiring a statement to be filed by mortgage servicer at the end of a case indicating that the debtor is current on payments and that no other fees are outstanding. Judge Kaplan expressed support for the idea of a similar annual statement so that problems are not encountered years down the road.

7. New Business –

- A. Attendance Requirements:** Minimum attendance requirements for LAC members - Judge Wizmur indicated that it would be wise to tighten the LAC attendance requirements. The group agreed to a “three strikes and out rule” that is, three consecutive missed meetings and the member is considered off of the LAC with a veto power to the Chair for recognized exceptions.

B. Proposed National Rule Amendments: Discussion of Proposed National Rule Amendments and LAC's opportunity to comment (2/14/08 and ongoing): Jim Waldron

Judge Ferguson and others welcomed the idea of being provided the opportunity to comment on proposed national rules before they are implemented. On a going forward basis, national rules will be explored by accessing the uscourts.gov website. The first of these rules to be discussed is the proposal to amend Fed. R. Bankr.P. 8002 to extend the appeal time in bankruptcy cases. Jim indicated that he was making a "special pitch" for such comments from the District as he participates on the national rules committee. He emphasized the importance of these comments by explaining that all comments are considered at the national level.

Any individual or collective comment is due by 2-15-08.

C. Dealing with DSO's: Dealing with Domestic Support Orders (DSO) in Chapter 13 Plans; January 15, 2008 letter of Isabel Balboa; Chapter 13 Subcommittee. The Chapter 13 Subcommittee is to report back at the next meeting on this issue.

D. Extension of Time to Answer: Request by Ira Deiches to consider an amendment to the Local Rules incorporating a version of Civ. Rule 6.1(b) of the District Court's Local Rules providing a one time automatic 15 day extension of time, supplied by the Clerk, for a defendant to reply to a complaint. It was recognized that this capability exists through incorporation of the District Court local civil rules.

E. Revision of stay relief order: Request by Marie-Ann Greenberg that LAC consider modifying form of stay relief order by adding a provision requiring the secured creditor to report any surplus funds realized after the Sheriff's sale to the Chapter 13 Trustee. The Chapter 13 Subcommittee is to report back at the next meeting on this issue.

F. How the Chapter 13 Trustee deals with secured creditors in confirmed cases who were being paid through the plan but receive stay relief; Al Russo has requested that the committee examine and make recommendations what to do with secured creditors who are being paid through the confirmed plan and then receive stay relief. In the past, the trustee has "zeroed" the creditor out, but there is concern that this procedure may not be correct. Possible

solutions include freezing plan distributions until a resolution is achieved, continuing distributions until the plan is modified by the debtor, or adopting a rule requiring debtor's attorney to resolve the matter with the trustee within a time certain, and perhaps amending the model order for stay relief by adding a paragraph with that requirement. This concept was discussed and Judge Kaplan indicated that he did not think that a claim could be "zeroed out."

Isabel Balboa indicated that she requires plan modification or she will dismiss the plan in 30 days. The issue was left undecided.

- G. Pay histories:** Request by Herbert Raymond that when payment disputes arise with mortgage lenders, the lenders be required to provide all pay histories using local form 16 and not their own forms which can be confusing and unreadable. Herb offered to view and analyze information and redesign the form.

Fee language in proofs of claim: Request by Herbert Raymond to review the appropriateness of language in exhibits annexed to proofs of claim where a creditor puts a debtor on notice that additional fees and costs will be charged to debtor for various tasks during the course of the bankruptcy. Judge Wizmur suggested the concept of a *pro forma* motion that would resolve any open issues where lender seeks additional fees and costs in a case to be completed. Herb indicated the fact that credit reports may be blemished where a debtor has been discharged and still fees and costs are being sought.

- H. Form of Retainer Agreement in Chapter 13 and 7:** Request by Herbert Raymond that the LAC consider adopting a model retainer agreement for use in Chapter 13 and 7 matters with the hope of reducing fee disputes.

- I. Fee for successful defense of stay lift motion or prosecution of certain motions:** Herbert Raymond has requested that the LAC consider adopting a local rule requiring a creditor to pay debtor's attorney a fee (flat or otherwise) for successfully defending against or prosecuting certain motions when the debtor prevails for certain specific reasons, such as the account being current, or the motion being withdrawn, or a claim motion by debtor resulting in a claim reduction. This idea was rejected by LAC by counter considerations of creditors attorneys.

J. Resource Sheets for Pro Se Debtors: Herbert Raymond has requested the LAC to review the advisability of preparing a form of resource sheet to be

distributed to pro se debtors. It was recognized that the court already has this information available at the Clerk's Office as well as pro se information that will be available on the Court's website.

8. Advise of future meeting dates – TBA